



COMMONWEALTH of VIRGINIA
Office of the Attorney General

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MEMORANDUM

TO: BRIAN MCCORMICK
Regulatory and Manual Section Manager
Virginia Department of Medical Assistance Services

FROM: REATHA B. KAY
Special Counsel to DMAS

DATE: March 24, 2006

SUBJECT: Final Regulations concerning Home and Community Based Services Mental Retardation Waiver ("MR Waiver")

You have asked the Office of the Attorney General to review and determine if the Department of Medical Assistance Services ("DMAS") has the legal authority to promulgate these final regulations and if these proposed regulations comport with state and federal law.

As you are aware, certain of the changes made in these final regulations conflict with the MR Waiver approved by the Centers for Medicare & Medicaid Services ("CMS") and currently in effect. I understand that DMAS intends to request an amendment to the MR Waiver to conform it to the changes made in these final regulations. Accordingly, this letter of assurance is subject to CMS' approval of an amendment to the MR Waiver that conform the provisions of the MR Waiver to the changes set forth these final regulations.

With respect to the changes to the final regulations, it appears that several changes to the final regulation are not changes with "substantial impact," and, therefore do not necessitate an additional comment period. Those changes are merely technical in nature or clarify the language in the regulation. It also appears that there are several changes that may constitute changes with

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“substantial impact,” and could necessitate an additional comment period. Pursuant to § 2.2-4013(C), if the Governor finds that one or more changes with substantial impact have been made to the proposed regulation, he *may* (but is not required to) direct DMAS to provide an additional thirty days to solicit additional public comment on the changes. In addition, Va. Code § 2.2-4007(K) requires the agency to solicit additional public comment, *if* it receives requests from at least twenty-five persons for an opportunity to submit oral and written comments on the changes to the regulation and if one or more changes with substantial impact were made to the proposed regulation.

Finally, please note that Va. Code § 2.2-4013(B) requires that all changes to the proposed regulations be highlighted in the final regulations, and it appears that this requirement has been fulfilled.

If you have any questions, please feel free to call me at 786-1841.

cc: Kim F. Piner, Esquire

Attachment